

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
ATLANTA BRANCH OFFICE
DIVISION OF JUDGES

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO; and INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO, LOCAL LODGE 2777
(L-3 COMMUNICATIONS VERTEX AEROSPACE
LLC f/k/a L-3 COMMUNICATIONS AERO TECH
LLC f/k/a VERTEX AEROSPACE LLC f/k/a
RAYTHEON AEROSPACE LLC)

and

Case No. 15-CB-5169

ROBERT PRIME, an Individual

Joseph A. Hoffman, Jr., Esq., for the General Counsel.

William H. Haller, Esq., for the Respondent.

Glenn M. Taubman, Esq., for the Charging Party.

BENCH DECISION

Statement of the Case

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Pensacola, Florida, on December 10, 2007. Robert Prime, an Individual, filed the charge on December 16, 2003 and amended it on September 12, 2007. On September 26, 2007, the complaint issued alleging that the International Association of Machinists and Aerospace Workers, AFL-CIO, and its Local Lodge 2777 (herein collectively called the Respondent or the Union) violated Section 8(b)(1)(A) of the Act by requiring nonmember employees who object to the payment of dues and fees for nonrepresentational activities to renew their objections on an annual basis, and by refusing to recognize the Charging Party as an objector since November, 2004 because he failed to renew his objection. The Respondent filed its answer to the complaint on October 10, 2007, essentially admitting the facts but denying that it violated the Act as alleged.

After hearing the testimony of witnesses, reviewing the documentary evidence, and considering arguments made by counsel for the parties in pre-trial memoranda and at the close of the hearing, I rendered a bench decision in accordance with Section 102.35 (a)(10) of the Board's Rules and Regulations. For the reasons stated by me on the record, I found that the Respondent Unions breached their duty of fair representation by requiring nonmember objectors to renew their objections on an annual basis and by refusing to treat the Charging Party as an objector since November, 2004 because of his failure to renew his objection. I concluded that this conduct violated Section 8(b)(1)(A) of the Act as alleged in the complaint.

I hereby certify the accuracy of the portion of the transcript, pages 113 through 133, containing my bench decision.¹ A copy of that portion of the transcript, as corrected, is attached to this decision as “Appendix A”.

5 Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent IAM shall be required to rescind the requirement that nonmembers who object to the payment of dues and fees for nonrepresentational activities renew their objections on an annual basis and to notify employees in bargaining units covered by a union security clause that this requirement is no longer in effect. I recommend that Respondent IAM communicate the rescission of the annual renewal requirement in the same manner that it communicates its objection procedures to employees, i.e. by publication in the IAM Journal. To the extent that Respondent Unions have charged and collected from the Charging Party, and any other objecting nonmembers, fees in excess of those required for representational activities as a result of a nonmember failing to renew his or her objection, the Respondent should be required to reimburse the nonmember, with interest, for any excess fees collected since the 2004 objection period.² I have chosen this reimbursement period because it coincides with the first year that Prime’s objection was not recognized as a result of his failure to renew it. There is no evidence before me of any specific individual denied objector status at an earlier date.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondents, International Association of Machinists and Aerospace Workers, AFL-CIO, Upper Marlboro, Maryland, and International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 2777, Milton, Florida, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Requiring nonmember employees, who are covered by a collective bargaining agreement containing a union security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis.

(b) In any like or related manner restraining or coercing employees in the exercise of the

¹ I shall correct the transcript, page 117, at line 17, where “background” should appear in place of the word “bargain”. I have also added the case citations for those cases referred to on the record.

² In the complaint, General Counsel sought, as a part of the remedy, compounding of interest. General Counsel has not provided any basis for adopting this new formula for calculation of interest under Board orders and I shall leave resolution of this issue to the Board.

³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

5 (a) Rescind the requirement that objecting nonmember employees renew their objection on an annual basis.

10 (b) Notify nonmember employees who are subject to a union security clause, by publication in the IAM Journal, that the annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded.

(c) Recognize Robert Prime as a continuing objector retroactive to November 2004 and continue to recognize his objector status until he revokes his objection.

15 (d) Reimburse Prime, with interest, for any fees collected from him in excess of those required for representational activities since his objector status was not renewed in 2004.

20 (e) Reimburse, with interest, any other objecting nonmember whose request for continuing objector status was not recognized since November 2004 for any fees collected in excess of those required for representational activities.

25 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement due under the terms of this Order.

30 (g) Within 14 days after service by the Region, post at its union office in Milton, Florida, copies of the attached notice marked "Appendix B."⁴ Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondents' authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the
35 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by L-3 Communications Vertex Aerospace LLC at its Pensacola facility at any time since November
40 2004.

45 (h) Sign and return to the Regional Director sufficient copies of the notice for posting by L-3 Communications Vertex Aerospace LLC, if willing, at all places where notices to employees are customarily posted.

50 ⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C., January 9, 2008.

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Michael A. Marcionese
Administrative Law Judge

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APPENDIX A

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5 3 JUDGE MARCIONESE: Thank you. Good afternoon. This
4 hearing will be in order.

10 5 As I indicated before we adjourned, I've basically taken
6 the time now to review the evidence that I've heard in the
7 hearing, as well as to consider the arguments that were made
15 8 orally here, as well as in your pretrial motions that were filed
9 on Friday and this morning, and I'm now prepared to render a
20 10 bench decision pursuant to the Board's rules and regulations.

25 11 Now, although this is a bench decision, under the
12 requirements I still need to include within my decision all of
25 13 the ordinary findings and conclusions that you would find in a
14 fully written decision, so I will begin at the beginning.

30 15 The charge in this case was filed initially by Robert
16 Prime, an individual, on December 16, 2003, and amended on
35 17 September 12, 2007, and that pursuant to that charge and amended
18 charge, the General Counsel issued the complaint and notice of
40 19 hearing in this case on September 26, 2007, alleging that the
20 International Association of Machinists and its local Lodge
45 21 2777 had violated Section 8(b)(1)(A) of the Act by requiring
22 nonmembers who object to paying full agency fees to renew that
50 23 status on an annual basis, and that is the sole issue before me
24 in this case.

25 25 Regardless of what other evidence might have indicated

1 were other issues, the only issue I need to decide is whether
5 2 that annual renewal requirement violates Section 8(b)(1)(A) of
3 the Act.

10 4 Now, the Respondent filed its answer to the complaint on
5 October 10, 2007, in which essentially the Respondent Union
6 admitted all of the factual allegations, denying only that the
15 7 annual renewal requirement violated the Act.

8 Now, jurisdiction in this case is based upon the fact that
20 9 Mr. Prime, while being represented by the union, was employed by
10 an employer engaged in commerce, and the facts establishing
11 commerce are that the employer, L-3 Communications Vertex
25 12 Aerospace, LLC, and its predecessors, a Delaware limited
13 liability company with a place of business at the Naval Air
30 14 Station here in Pensacola, Florida, was engaged in aircraft
15 maintenance and support, and that annually in conducting its
16 operations, it provided aircraft maintenance and support to the
35 17 U.S. Government valued in excess of \$50,000, and based upon
18 that, the employer has a substantial impact on the national
19 defense of the United States, and that it also ships and sells
40 20 from the facility goods valued in excess of \$50,000 directly to
21 points outside the state of Florida, and purchases and receives
45 22 goods valued in excess of 50,000 directly from outside the state
23 of Florida, and thus is engaged in commerce within the meaning
24 of the Act.

50 25 There is also no dispute that the Respondent union is a

1 labor organization within the meaning of the Act, and I so find,
5 2 and that the local lodge as well is a labor organization.

3 There also is an admission that the international
4 president, Mr. Buffenbarger, and the general secretary-
10 5 treasurer, Mr. Mart, are agents of the union within the meaning
6 of Section 2(13) of the Act, and that by virtue of Section 9(a)
15 7 of the Act, the Respondent unions have been exclusive
8 collective-bargaining representative of a unit of employees
9 employed by this employer.

20 10 And the unit as set forth in the complaint is all
11 production and maintenance employees, including aircraft
25 12 inspectors and leads employed by the employer in the T-39
13 undergraduate military flight officer training program at NAS,
14 Pensacola, Florida; excluding all office clerical employees,
30 15 professional employees, guards and supervisors as defined in the
16 Act;

35 17 That since August 1, 2005, by virtue of 9(a), the
18 Respondent unions are also the exclusive collective-bargaining
19 representative of the following unit of employees, and that's
40 20 production and maintenance employees employed at AIMD,
21 Pensacola, Florida, in keeping with the certification issued by
45 22 the NLRB on January 17, 1995, in case number 15-RC-7873, for the
23 purpose of collective bargaining with respect to wages, hours of
24 work and other conditions of employment of employees in the
50 25 bargaining unit as herein defined. As of January 1, 1999, this

1 included the UH-3H SAR helicopter project.

5 2 Rather than repeat this all here and take the time, I'll

3 just note that the units are as described in the complaint, and

4 I will set them forth in my written order adopting this.

10 5 There's also no dispute in terms of the complaint and the

6 admission that the employees in those bargaining units have been

15 7 subject to provisions and collective-bargaining agreements that

8 require the employees to either become or remain members of the

9 union, or pay an agency fee to the union. And as such, they

20 10 would be covered by the Supreme Court's decision in Beck.

11 There's also no dispute that in the course of its business

25 12 as a union, that the Respondent unions have expended some of the

13 monies collected pursuant to the contractual provisions from

14 employees in those units for purposes that are both

30 15 representational as the Courts have defined them and non-

16 representational, and there's also no dispute that the Charging

35 17 Party, Mr. Prime, has at all times been employed as a member of

18 the bargaining units at issue in this proceeding.

19 And bringing us up to the issue in dispute here is that on

40 20 November 9, 2003, Mr. Prime, in fact, sent a letter to the

21 union, exercising his rights to object to the payment of agency

45 22 fees beyond what was necessary to support the union's

23 representational activities, and in that letter in 2003, he

24 indicated his desire that his objection be treated as continuing

50 25 in nature.

1 And there's also no dispute that the Respondent replied to
5 2 that letter by denying -- recognizing him as an objector for
3 that year only, and denying his request to be treated as an
4 objector on a continuing basis, citing its procedures that are
10 5 published annually in the IAM periodical.

6 Okay. Now, the issue would seem to be fairly
15 7 straightforward at that point, and, in fact, the Board had
8 already ruled on a motion for summary judgment in another case
9 as to whether the denial of an objection based on an annual
20 10 renewal requirement violates the Act, and had remanded that case
11 for development of a record, showing, I guess, facts regarding
25 12 the reasonableness of the union's requirement and the burdens
13 and impact of such a requirement, both on the objectors and the
14 union, which is the reason that we are here holding this hearing
30 15 today rather than deciding this case on a stipulated record.

16 Now, the evidence that was presented today, other than,
35 17 you know, background evidence and the actual procedure itself and
18 how it's been communicated to the employees, consisted
19 essentially of the testimony of the Charging Party Mr. Prime and
40 20 of Mr. Minnich, the union's assistant secretary, who is involved
21 in the administration of the union's procedures for nonmember
45 22 objectors.

23 Now, Mr. Prime testified when asked that he felt harassed
24 by the annual renewal requirement, because in his view, once he
50 25 has told the union that he doesn't want to support its political

1 agenda, it should be up to him to let the union know if he's
5 2 changed his mind, and furthermore, that since he doesn't read
3 any of the IAM's periodicals or newspapers, he would receive no
4 notice of his obligation to renew every year or even of the time
10 5 period within which such a renewal were to be filed, and as a
6 result, would risk either forgetting to renew or would risk
15 7 filing it at a different time than the union has imposed, and
8 thus would lose his right to object.

9 And he compared the situation to other groups where he has
20 10 indicated that he is resigning from the group, and his
11 resignation is considered complete at that point, and he's not
25 12 required every year to tell the group that he is resigning.

13 Now, at the same time, Mr. Prime acknowledged that in
14 order to accomplish the renewal, all that he needs to do is
30 15 write a letter and pay the cost of postage to send it to the
16 international union and let them know that he is renewing it.

35 17 Now, Mr. Minnich, when testifying for the union,
18 essentially the primary reason that he advanced for requiring
19 objectors to renew on an annual basis is the union's desire to
40 20 keep track of the objectors in case they had changed their
21 address or moved from the prior year for number one reason so
45 22 that they would know where to send the annual audit, showing how
23 the union is calculating the fee reduction for the coming year
24 and indicated that the union expends a good deal of money not
50 25 only compiling that, but also mailing it first class to each

1 nonmember who has filed an objection, and that if they -- and it
2 would be even more costly if they were to file it to the wrong
3 address, have it returned, and then have to resubmit it to
4 another address.

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6 And he also indicated that another reason for the annual
7 renewal appears to be in order to keep track and ensure that
8 employees who may filed an objection in a prior year out of
9 unhappiness or pique over, say, a contract deal that had been
10 negotiated by the union, that they still really were interested
11 in continuing their objection in following years, because as the
12 Union indicated, not all objectors do so on ideological or
13 principled grounds as Mr. Prime has expressed.

14 Now, at the same time, another fact Mr. Minnich also
15 testified that because the union is required by law to send this
16 breakdown every year to employees who object, it's reasonable to
17 require the objectors to notify the union each year that they
18 still intend to file to object to the nonrepresentational
19 activities.

20 Now, Mr. Minnich did indicate that out of 700,000 --
21 approximately 700,000 employees cover by the IAM, only about 900
22 to 1,000 nonmembers object every year, and he also testified
23 that about 95 to 97 percent of the audit packets that are mailed
24 out to objectors in fact make it to the correct address, and
25 this is probably, I would say, due to the extensive efforts that
the union, in fact, utilizes to keep track of its membership and

1 keep its database current through reports filed by the local
5 2 lodges and its constant surveillance of those reports to make
3 sure that the information is accurate and up to date.

10 4 Now, and Mr. Minnich also acknowledged in his testimony
5 that although it does not recognize continuing objections from
6 individuals like Mr. Prime who are covered under the National
15 7 Labor Relations Act, it already has in place a system for
8 accepting continuing objections from employees who are covered
9 by contracts under the Railway Labor Act, and that is based on
20 10 other court cases in which courts have ruled that the annual
11 renewal is not permissible.

25 12 All right. Now, the parties have each filed memoranda
13 which I've considered and essentially followed up with some oral
14 argument today. The General Counsel, while setting forth
30 15 arguments pro and con on the annual renewal, essentially takes
16 no position, leaving it for the Board to decide and therefore is
35 17 of no assistance to me in deciding this case, whereas you would
18 expect the General Counsel would be the first person to tell me
19 why something is unlawful.

40 20 Now, the Charging Party argues takes a different approach,
21 arguing that the annual renewal violates the Act, but not on the
45 22 duty of fair representation standard that the other parties seem
23 to focus on. Rather Mr. Taubman argues that employees have a
24 statutory right to remain nonmembers and refuse to financially
50 25 support a union's political, ideological or non-representational

1 activities, and thus any limits placed on their exercise of that
2 right -- I'm sorry. They have the right to refrain and limit
3 their obligation under lawful union security clauses to paying
4 only their financial core fee.

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10 5 Now, under the view espoused by the Charging Party, the
6 union has a statutory right to -- a duty to recognize such
15 7 objections and adjust the financial obligations of nonmembers
8 who object, and that its collection of any more than that
9 financial core would be a per se violation of the Act, and I
20 10 hope I'm getting this correct, and essentially that it's not for
11 the union to determine whether a nonmember's objection, once
25 12 voiced, has terminated, that only the employee can exercise the
13 right to change his mind.

30 14 Now, the Respondent argues that the only standard
15 appropriate for deciding this issue is the duty of fair
16 representation based on the Supreme Court's decision in Beck,⁵
35 17 and the Board's decision in California Saw & Knife Works,⁶ and
18 that essentially is that whether the requirement for annual
19 renewal is arbitrary, discriminatory or in bad faith.

40 20 And the Respondent Union argues that the requirement is
21 not arbitrary under Board law, because it is within the wide
45 22 range of reasonableness that is allowed to unions, and that it
23 is not wholly irrational and justified by the union's need to

50 ⁵ *Communication Workers of America v. Beck*, 487 U.S. 755 (1988).

⁶ 320 NLRB 224, 229-230 (1995).

24 keep current on addresses where they have to mail the expensive
25 annual audit.

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1 The Respondent Union also argues that it's not
2 discriminatory, because unlike union membership or dues check-
3 off authorization where no annual renewal is required, there is
4 no annual event that would trigger a renewal of such status,
5 whereas under the law, since the union must make an annual
6 accounting of the amount it spends on representational and
7 non-representational activities and report that to nonmembers on
8 an annual basis so that they can make an intelligent decision
9 whether to object, it's reasonable and not discriminatory to
10 also at the same time require the objector to renew the
11 objection on an annual basis.

12 The Union also points to the burden that it would have if
13 it had to determine from each letter submitted by a nonmember
14 whether the individual is objecting just for that year or on a
15 continuing basis, because as I indicated previously from Mr.
16 Minnich's testimony, not all objections are ideologically based.
17 All right. And it also points out that the -- in comparing the
18 relative burdens, the burden on an individual objector is
19 minimal compared to the burden that would be imposed on the
20 union of having to administratively determine what's a
21 continuing and what's an individual objection, and then having
22 to adjust its procedures accordingly.

23 Okay. Now, having considered the arguments and not just

24 those but anything that might have been contained in the
25 memoranda, the first issue, which we talked about briefly, is

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1 whether or not the case is even moot because of the testimony of
2 the Charging Party, that as far as he knows he's continued to
3 pay the reduced fees of an objector since 2002 notwithstanding
4 the international union's letter rejecting his request to be
5 treated as a continuing objector and requiring him to file on an
6 annual basis.

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7 Now, even though it's not entirely clear from the record
8 whether that is, in fact, true, assuming that it is the case, I
9 agree that the issue is not moot here, because as Mr. Minnich
10 testified, speaking for the international union, the IAM
11 considers him to be a non-objector agency-fee-payer, required to
12 pay the full amount of fees, not the reduced fees, because he
13 did not renew on an annual, so that even if his local lodge were
14 letting him essentially get away with paying the reduced fee,
15 that's not the way it should be, and so essentially the danger
16 still stands that at some point, they would decide to enforce
17 that against him and thus require him to pay the full agency
18 fee, so the issue is still ripe even as to Mr. Prime.

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19 And I also note that it appears that because of his status
20 in the international's records as a full agency-fee-payer, he is
21 not getting the annual audits that are sent to people who file
22 their objections and renew them on an annual basis. And I'll
23 also note that since this is a national procedure applicable to

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24 not just Mr. Prime but other nonmembers, there still is an issue
25 to be decided as to whether or not the renewal is valid.

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1 The next thing I'm going to note before we reaching the
2 merits is a concern that I raised about the General Counsel
3 changing its position on this issue, and while the General
4 Counsel, in exercising its prosecutorial discretion certainly
5 has the right to change its view of the law and place before the
6 Board this new issue to decide, the fact that the General
7 Counsel has not challenged the annual renewal requirement
8 previously when it had the opportunity to do so and most notably
9 in the California Saw & Knife Works case which was the lead case
10 under Beck which challenged the very procedures that the IAM had
11 adopted, that the fact that the GC essentially did not challenge
12 the annual renewal through all these years I see as part of
13 the -- although it's not a basis for me to dismiss the
14 complaint, since I don't have the authority to do that, it seems
15 to me that it is part of the factual and legal landscape in
16 which the union operated, which is one of the factors that the
17 Board and the Courts have considered in determining whether a
18 union's actions under the duty of fair representation is
19 arbitrary or not.

20 Now, turning to the merits, while the Charging Party's
21 argument in terms of a per se type of violation for interfering
22 with Section 7 rights is actually somewhat intriguing and
23 appears to me to have some merit, essentially I agree that if,

24 in fact, employees have the right to refrain from union
25 membership and support which is equal to the right to join and

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1 support a union, then it seems to me any action by a union which
2 interferes or restrains with employees' exercise of that right
10 3 would violate the Act to the same extent that employer conduct
4 interfering with employees' rights to engage in protected
15 5 activity would violate the Act.

6 But saying that, it appears to me that under the current
7 state of the law, citing both Beck and California Saw & Knife
20 8 Works, it has been determined that treatment of objecting
9 nonmembers is to be judged under a duty-of-fair-representation
25 10 standard, and I will leave it to the Board to determine if some
11 other standard should apply to these types of cases.

12 Now, applying a duty-of-fair-representation standard, the
30 13 Courts and the cases cited by the Board in the remand in that
14 other case that the General Counsel had attached to his
35 15 memorandum involving the UAW at Colt's Manufacturing, the Board
16 has cited cases noting that essentially there are three distinct
17 prongs to the duty of fair representation, and it is whether the
40 18 conduct of the union is arbitrary, discriminatory or in bad
19 faith, and it is found to be any one of those, then it would
45 20 violate Section 8(b)(1)(a) of the Act.

21 Now, I will note initially that it doesn't appear that
22 anyone in this case is -- and I may be wrong on this; you can
50 23 correct me, Mr. Taubman, if I am -- that anyone is challenging

24 the annual renewal requirement as being in bad faith, and even
 25 if that were to be argued, I would reject that, because simply

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1 think there's no evidence in the record before me to indicate
 2 that in adopting an annual renewal requirement, that the union
 10 3 was acting other than for what it perceived to be administrative
 4 purposes in carrying out its obligations under the Beck law,
 15 5 rather than any kind of bad faith on the part of the union.

6 Now, with respect to arbitrariness, the cases cited by the
 7 Board in the remand, the O'Neill case⁷ and there's a case
 20 8 involving Black, I think it is, versus Ryder/PIE,⁸ essentially
 9 have indicated that the Board has interpreted arbitrariness as
 25 10 determining whether a union's actions are so far outside the
 11 wide range of reasonableness as to be considered irrational.
 12 And those cases and other cases cited by the Board distinguish
 30 13 that from the discriminatory prong of the duty of fair
 14 representation where if conduct is indeed discriminatory or in
 35 15 bad faith, then it can never be reasonable.

16 So in evaluating the annual renewal requirement under the
 17 arbitrary prong, I must consider whether it is so far outside
 40 18 the range of reasonableness as to be irrational. Now, I will
 19 note before getting to that that it seems that a number of those
 45 20 cases applying that test dealt with issues in terms of how a
 21 union handled collective bargaining and the bargain that

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⁷ *Air Line Pilots v. O'Neill*, 499 U.S. 65, 78 (1991).

⁸ *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 584 fn. 18 (6th Cir. 1994).

22 resulted from contract negotiations or how it administered
 23 contracts and grievance procedures in determining whether or not
 24 to file a grievance or proceed to arbitration.

25 And I can see in a situation like that deference to a

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1 union's judgments and a wide range of reasonableness would be an
 2 appropriate standard. I'm not sure if the Board has really ever
 3 said specifically that in determining how a union treats someone
 4 who has filed an objection as a nonmember to paying for --
 5 supporting a union's non-representational activities, that the
 6 union is indeed required to such a wide range of reasonableness,
 7 but I'll accept that as the law since it doesn't appear that
 8 it's been held to the contrary.

9 I think there are different types of conduct by a union to
 10 be evaluated with different factors that might cause less
 11 discretion when dealing with a nonmember's objection than in
 12 dealing with how a union negotiates a contract or determines
 13 whether to go forward to arbitration or not.

14 But in any event, in applying the arbitrariness standard,
 15 on the first hand I cannot say, looking at the facts, that
 16 annual renewal is irrational. As the Respondent points out, it
 17 has to by law annually calculate the fee reduction and how much
 18 it is going to charge to nonmembers who object and that, in act,
 19 as shown by the procedures contained in the annual periodicals
 20 distributed to the employees, that does change from year to
 21 year, and it is not a minor change. It can sometimes be

22 significant.

23 So there is, of course, always the possibility that

24 someone who objects one year might change their mind and not

25 object based on the calculation for subsequent years, so it's

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1 not unreasonable, I think, to expect that employees who object

2 let the union know each year after it gets the annual

3 notification whether the individual still objects.

4 And also, too, the union's concern about sending objection

5 materials to the correct address is not an unreasonable one on

6 its face, but at the same time, I note that the Respondent has

7 conceded that it does have other means of keeping track of both

8 members' and nonmembers' current addresses and that, in fact,

9 almost all of the packets that are sent out find their way to

10 the correct address, so that the problem of keeping updated

11 information does not seem to be that significant a burden on the

12 union to require annual renewal.

13 And at the same time, looking at the relative burdens, the

14 burden on the objecting nonmember appears on its face to be

15 slight, essentially the cost of mailing a letter or postcard

16 every year to the union and keeping themselves aware of when

17 they have to do that, but at the same time, when someone like

18 Mr. Prime has ideological objections to supporting a union and

19 is not likely to be reading the IAM's periodicals, there is a

20 risk that such an individual will not become aware if the union

21 should change the time period for filing or can simply forget

22 that he has to renew, so there is somewhat of a risk and burden
23 on the nonmember from the annual renewal requirement.

5 24 And finally in terms of considering the factor in terms of
25 the factual and legal landscape within which the union is

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10 1 operating in adopting and maintaining this annual renewal
2 requirement, as I indicated before, I already found that that
15 3 factual and legal environment includes essentially acquiescence
4 by the General Counsel and such a requirement over a number of
5 years despite previous opportunities to challenge the legality
20 6 of it, but at the same time, the factual and legal environment
7 includes the fact that the union already recognizes continuing
25 8 objections filed by employees who work under the Railway Labor
9 Act, and it, in fact, has a system in place to handle continuing
30 10 objections.

30 11 So it seems to me unreasonable, bordering on the
12 irrational, not to apply the same procedures to similarly-
35 13 situated employees who are covered by the National Labor
14 Relations Act, so although the Union has advanced some arguments
15 that would indicate that the requirement is reasonable and has
40 16 some basis with some rationality to it, I think considering the
17 fact, which is undisputed, that they already do and can treat
45 18 objections on a continuing basis and that I don't see any real
19 good rationale for not doing so when someone like Mr. Prime
20 makes clear on the face of his request that he wants his
50 21 objection treated on a continuing basis, I am constrained to

22 find that the union's requirement is, indeed, arbitrary under
23 the duty-of-fair-representation standard.

5 24 Now, I'm also going to discuss the discriminatory
25 standard, and as I've noted previously under Board law, if the

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10 1 annual renewal requirement is found to be discriminatory, then
2 it would not matter whether it was also -- whether there was any
15 3 arguments to be made that it was reasonable, and on its face,
4 the annual renewal does, in fact, discriminate against
5 nonmembers who have stated a desire to refrain from supporting
20 6 the union's non-representational activities, because the union
7 imposes no similar requirement on employees who show their
25 8 support for the union by either joining the union or signing a
9 dues check-off authorization.

30 10 Now, the Union's argument that the difference is that the
11 person who signs a check-off authorization or joins the union,
12 there's no annual triggering event that would coincide with a
35 13 need to renew their status, that essentially goes to the
14 reasonableness of the requirement, not whether or not
15 individuals are being treated differently because of whether or
40 16 not they support the union and the degree to which they support
17 the union.

45 18 An employee like the Charging Party who has clearly stated
19 his desire to be treated as an objector, until he informs the
20 union otherwise, is entitled to have that request recognized and
50 21 granted to the same extent as an employee who joins the union

22 and evinces his support for the union by signing a dues check-
23 off authorization.

5 24 So having considered all of the evidence and the arguments
25 by the parties, although I consider the issue a close one and

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10 1 somewhat difficult, I do find as alleged in the complaint that
2 the union's requirement that nonmembers who object renew that
15 3 objection on an annual basis is, in fact, a breach of the duty
4 of fair representation, and accordingly, violates Section
5 8(b)(1)(A) of the Act.

20 6 Now, for a remedy, because this procedure is included in a
7 procedure that's of nationwide application, I will require that
25 8 the union rescind the annual renewal requirement from its
9 procedures for objectors and that it inform not just Mr. Prime
10 and employees in his bargaining unit, but also employees who are
30 11 covered by the procedure on a nationwide basis that the
12 requirement has been rescinded, and I would -- although I will
35 13 give some further consideration to this before I issue my final
14 order, but it would seem to me an appropriate way to do this,
40 15 rather than a notice posting, would be to publish it in the same
16 manner in which the union publishes the annual notice of the
17 Beck procedures.

45 18 Also with respect to the individual Charging Party, since
19 it's unclear, to the extent he has been required to pay anything
20 more than the reduced fees of a nonmember objector over the past
50 21 few years, I will require the union to reimburse him with

22 interest for any extra dues or fees he's had to pay, and to
23 continue to recognize him on a continuing basis as an objector.

5 24 Now, what I will do is when I receive the transcript, I
25 will review the portions that contain my bench decision, make

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10 1 any corrections that need to be made, and certify them to the
2 Board. Then I will issue an order which will contain the
15 3 complete order with any remedy that I'm recommending, including
4 any notice posting, and at that point, once that issues, any
5 party who is unhappy with not only my decision or conclusions
20 6 but also any rulings that I may have made during the hearing has
7 a right to file exceptions with the Board in Washington.

25 8 I'll refer you to the Statement of Standard Procedures
9 that you received with the complaint and notice of hearing for
10 how to go about filing exceptions with the Board. You could
30 11 also take a look at the Board's rules and regulations.

12 Okay. Anything further before we close the hearing?

35 13 MR. HALLER: No.

14 MR. HOFFMAN: No, Your Honor.

15 JUDGE MARCIONESE: No? Did you have a question?

40 16 MR. TAUBMAN: Yes. I don't know if this is appropriate or
17 not, but it's a question which if it's not appropriate, just
45 18 tell me, but the issue of a remedy to other individuals who may
19 have had their -- who may have also been refused an annual
20 renewal?

50 21 JUDGE MARCIONESE: I think, because -- again, if I change

22 my mind, it certainly will be -- and I know you made that
23 argument in your memorandum which is now part of the record.
5 24 Because the allegation is against the international union and
25 the procedures of the international, and they apply nationwide,

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10 1 at this point, my inclination would be that the remedy would go
2 to any objector who has failed to renew their objection and as a
15 3 result, has not been recognized as such as a result of the
4 failure to comply with that requirement.

5 Of course, you can take exceptions to that, and I may
20 6 revise it when I issue my final order, but that's where I would
7 be leaning at this point.

25 8 All right. If there's nothing further, then the hearing
9 is closed, and I thank you all very much for your memoranda and
30 10 your assistance in helping me decide this case. Thank you.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.
Choose representatives to bargain on your behalf with your employer.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these protected activities.

WE WILL NOT require nonmember employees, who are covered by a collective bargaining agreement containing a union security clause and who object to the payment of dues and fees for nonrepresentational activities, to renew their objections on an annual basis.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the requirement that objecting nonmember employees renew their objection on an annual basis.

WE WILL notify nonmember employees who are subject to a union security clause, by publication in the IAM Journal, that the annual renewal requirement for objections to payment of dues and fees for nonrepresentational activities has been rescinded.

WE WILL recognize Robert Prime as a continuing objector retroactive to November 2004 and continue to recognize his objector status until he revokes his objection, and WE WILL reimburse him, with interest, for any fees collected from him in excess of those required for representational activities since his objector status was not renewed in 2004.

WE WILL reimburse, with interest, any other objecting nonmember whose request for continuing objector status was not recognized since November 2004, because of the annual renewal requirement, for any fees collected in excess of those required for representational activities.

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO and its
LOCAL LODGE 2777

(Labor Organization)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1515 Poydras Street, Room 610
New Orleans, Louisiana 70112-3723
Hours: 8 a.m. to 4:30 p.m.
504-589-6361.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 504-589-6389.